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IN THE

Supreme Court of the United States

October Term, 1973
No. 72-1589

VIOLA N. RICHARDSON, as County Clerk and Registrar of Voters for the County of Mendocino, individually and as a representative of the class of all other County Clerks and Registrars of Voters,

Petitioner,

vs.

ABRAN RAMIREZ, LARRY GILL and ALBERT LEE, on behalf of themselves and all others similarly situated, Los Pintos, 7th Step Foundation, Inc. (California Affiliates), Prisoners' Union, and The League of Women Voters of California,

Respondents.

Brief Amicus Curiae of the American Civil Liberties Union of Southern California in Support of Respondents.

Interest of Amicus Curiae.*

The American Civil Liberties Union of Southern California is an organization dedicated to the preservation of the rights guaranteed by the Bill of Rights. One of the most vital of these, not only to the individuals involved, but to the body politic, is the right to vote. Of

*Per Rule 42(2) of this Court, letters of consent have been filed with the Clerk.

concern also is society's apparent inability to afford ex-felons an atmosphere conducive to their rehabilitation and reintroduction into the mainstream of life once they have paid the penalty demanded for their crime. Prohibitions against ex-felons voting, like prohibitions against them from holding jobs, continue to impress upon such persons that they are second-class citizens and discourage and impede their ability to again be gainful members of society. Because, in amicus' view, the ex-felon voting prohibition has no reasonable relation to any interest which the State may be entitled to protect and certainly is not necessary to protect any compelling interest of the State, amicus files this brief. It is designed to show that archaic concepts about keeping ex-felons forever down can no longer be indulged.

ARGUMENT.

I.

Disfranchisement of Persons Convicted of Crime When Measured by Contemporary Standards Constitutes a Denial of the Equal Protection of the Laws.

Petitioner, the Registrar of Voters of Mendocino County, California, asks this Court to reverse the decision of the Supreme Court of California so that, as she puts it, she may perpetuate the "historic exclusion of felons from the franchise." Petitioner's Brief at 7.

History shows that in Roman times, as well as among preliterate tribes, the offender was banished from society, sometimes so that gods would be placated and on other occasions to prevent the endless retaliation by the kin of his victim.[1] Today, "civil death" statutes exist in many states, including California,[2] as a reminder that Roman civilization, its needs and eccentricities have not passed away after more than 2,000 years.

Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change, however.[3] In overruling a previous decision which had up-

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[1]Geis, "Law, Politics and Ex-Offenders in the Correctional Process" in OFFENDERS AS A CORRECTIONAL MANPOWER RESOURCE (Joint Commission on Correctional Manpower and Training, Washington, D.C. 1968), 27 [hereinafter "Geis"].

[2]Penal Code § 2600.

[3]As Justice Hufstedler of the Ninth Circuit Court of Appeals aptly put it,

> "Earlier in our constitutional history laws disenfranchising persons convicted of crime may have been immune from attack but constitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber." *Dillenburg v. Kramer*, 469 F.2d 1222, 1226 (1972).

held the State's use of the poll tax as a condition to the exercise of the franchise, this Court stated,

> "[T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are constitutionally discriminatory we have never been confined to the historic notions of equality any more than we have restricted due process to a fixed catalog of what was at a given time deemed to be the limits of fundamental rights." *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 669 (1966).

Protection of the electoral process was first given as a justification for disfranchisement in *Washington v. State of Alabama*, 75 Ala. 582, 585 (1884), in which the court stated:

> "The manifest purpose is to preserve the purity of the ballot box . . . the presumption is that one rendered infamous by conviction of felony, or other base offense indicative of great moral turpitude, is unfit to exercise the privilege of suffrage. . . ."

The presumption that a person convicted of a crime, even a crime involving "great moral turpitude", constitutes a threat to the purity of the ballot box breaks down in the face of studies indicating widespread, even ubiquitous, criminal conduct on the part of our whole society, aberrant of enforcement procedures, the absence of any proven relationship between election fraud and franchisement of ex-convicts, and the salutary effect on ex-convicts of integrating them into the mainstream of society.

A study by Wallerstein and Wyle revealed that of 17,000 middle-class adults interviewed, 99% admitted

to having committed offenses punishable by at least one year of imprisonment. About two-thirds of the men and one-third of the women admitted to having committed felonies.[4] There does not appear to be a correlation between economic status and delinquency, although there are differences in type of offense.[5] Two independent field studies found that 100% of the college students studied had been involved in offenses serious enough to justify court action.[6] The President's Commission on Law Enforcement and Administration of Justice reported that six out of ten children in our population will be arrested and nine out of ten will have committed an offense for which they could be arrested.[7] It has been estimated that in 1960 there were about 50 million Americans with criminal records, 10 million of whom have records for crimes that are considered serious.[8] While it is true that many offenders become known because they persistently violate the law, nevertheless, the findings of these studies suggest that criminality is a normal condition in American society while noncriminality is deviant. Thus, if Petitioner's cause is upheld, those who are entitled to vote may be reduced to a "discreet and insular minority".

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[4]Wallerstein & Wyle, "Our Law-Abiding Lawbreakers", PROBATION 107-112 (1947).

[5]Nye, FAMILY RELATIONSHIPS AND DELIQUENT BEHAVIOR (1958).

[6]Cohen, DELINQUENT BOYS (1955); Porterfield, "Delinquency and Its Outcome in Court and College", AMERICAN JOURNAL OF SOCIOLOGY, 199-208 (1943).

[7]President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY, 55 (1967).

[8]Reuben, CRIME AND JUVENILE DELINQUENCY, A RATIONAL APPROACH TO PENAL PROBLEMS, 150-151 (2d Ed. 1961).

As the California Supreme Court pointed out, there is not a shred of evidence to support the presumption that ex-convicts today pose a greater threat to the integrity of the ballot box than those persons admittedly qualified to vote. *Ramirez v. Brown*, 9 Cal.3d 199, 214, 107 Cal.Rptr. 137 (1973). To the contrary, there is strong evidence for the proposition that allowing the ex-convict to vote has no effect at all on incidence of election crime but does have a positive effect on the reduction of crime in general.

In addition to the State statutes which we understand will be cited in Respondent's Brief, several model acts have been proposed which would restore civil rights, including the right to vote, to those convicted of crime immediately upon successful completion of their sentence or parole.[9] Among the supporters of this proposal are the National Council on Crime and Delinquency, the National Probation and Parole Association, and the President's Commission on Law Enforcement and Administration of Justice. Such organizations can hardly be accused of "radical" philosophies or being "soft on crime."

In their treatise, PRINCIPLES OF CRIMINOLOGY (1955), Sutherland and Cressy state that to allow offenders to remain in general society, "is the best situation in which to develop character and at the same time to receive assistance in adapting themselves to the

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[9]See, Commission on Uniform State Law, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAW, 295 (1964); MODEL PENAL CODE 306.6 (Proposed Official Draft 1962); National Council on Crime and Delinquency, "Annulment of a Conviction of Crime", CRIME AND DELINQUENCY, 97 (1962); National Probation and Parole Association, STANDARD PROBATION and PAROLE ACT, §§ 12 and 27 (1955).

conditions of life, so that they will not be so impotent in struggling against the conditions which produce the delinquency." *Id.* at 440. On the other hand, denying offenders access to the norms of community living has been found to deter the offender's successful integration into society and to contribute to antisocial behavior. Reinhardt, "The Discharged Prisoner and the Community", 21 FED. PROBATION 47 (1957); E. Johnson, CRIME, CORRECTION AND SOCIETY, 527 (1968); Edmundson, "Civil Rehabilitation", 27 CAN. B. REV. 1091 (1949); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS, at 7 (1967).

> "The community environment has crucial influence on the possibilities of the offender's successful integration . . . apart from his own efforts, successful adjustment is patterned, implemented, or obstructed by forces exerted by the socio-cultural environment. . . . When the community is reluctant to accept the offender back, the possibility is reduced that he will make a successful readjustment." Johnson, CRIME, CORRECTION AND SOCIETY, 169 (1968).

Restoration of the franchise would not only benefit the individual offender but offenders in society as a whole. Given the franchise, offenders would be able to attract much more attention from the political system to the condition in our prisons and the problems of ex-convicts in their attempt to successfully integrate into society.[10] Indeed, it can be legitimately argued that the ex-convict's vote is worthy of unusually stringent

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[10]Geis, n. 1, *supra* at 26.

constitutional protection because in the past there has been a pattern of discrimination against him by the very legislators for whom he is not allowed to vote.[11] And, as the President's Commission on Law Enforcement noted:

> "Convicted persons are generally subjected to numerous disabilities and disqualifications which have little relation to the crime committed, the person committing it, or, consequently, the protection of society. They are often harsh out of all proportion to the crime committed."[12]

Accordingly, in light of the above, it cannot be soundly contended that the State has met its heavy burden of justifying the disenfranchisement of this considerable portion of the population.

II.

The California Scheme for Re-Enfranchisement Does Not Satisfy the Requirements of Equal Protection or Due Process of Law.

A. California's Pardon Procedure Does Not Satisfy the Equal Protection Objections to Disfranchisement of Ex-Convicts.

Petitioner contends that California's pardon procedure answers the objections of ex-convicts who are denied the right to vote. Petitioner's Brief at 21-24. Amicus submits that the pardon procedure does not answer these objections for the following reasons.

First, if the State has no Constitutionally valid basis for denying the vote to those convicted of crimes, no

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[11]Du Fresne, "The Case for Allowing 'Convicted Mafiosi to Vote for Judges': Beyond Green v. Board of Elections of New York City", 19 DePAUL L. REV. 112 (1969).

[12]TASK FORCE REPORT, *supra* at 88.

scheme for the restoration of the right to vote can excuse the initial denial of that right.

Second, the pardon procedure has serious constitutional defects of its own.

Under the California system a person convicted of a felony may, after discharge from custody or release on parole, file notice of his intention to apply to the Superior Court for a certificate of rehabilitation and pardon. Penal Code[13] Section 4852.01. The application itself can be made upon a showing that the individual has resided in the county in which he is applying for a period of three years plus thirty days for each year of the term prescribed by statute as the maximum penalty for the crime of which he was convicted. Section 4852.03. In addition, the applicant must show that he has lived an upright and honest life. Section 4852.05. If he meets the above criteria, the court shall issue him a certificate of rehabilitation. Section 4852.13. The certificate of rehabilitation does not by itself restore civil rights. It only acts as an application to the Governor for a full pardon. Section 4852.16. The Governor may then grant a pardon based on the Superior Court's certificate of rehabilitation or he may order a further investigation. In no case may the Governor grant a pardon to one twice convicted of a felony except upon the recommendation of the California Supreme Court. Section 4852.16; California Constitution, Article IV, Section 8.

California's pardon procedure is not reasonably related to the determination of an ex-con's fitness to

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[13]All future references are to the Penal Code, unless otherwise noted. The sections referred to herein are set forth in the Appendix to Petitioner's Brief, pp. xiv-xxiii.

vote. In *Dunn v. Blumstein*, 405 U.S. 330 (1972), this Court struck down a Tennessee law that required a prospective voter to be a resident of the state for one year and of the county for 90 days. The Court stated, "Given the exacting standard of precision we require of statutes affecting constitutional rights, we cannot say that durational residence requirements are necessary to further a compelling state interest." *Id.*, 405 U.S. at 360. While the mere passage of time may provide some evidence as to the offender's rehabilitation, in light of the close scrutiny which must be given voting restrictions, a period of three or more years seems excessive. Evidence of the offender's conduct in prison or on parole is immediately available as is a description of the circumstances which led up to the commission of the particular crime. The testimony of friends, relatives, employers, ministers, and parole officers is always available. It should be left to the ex-convict to present this evidence to the registrar of voters or to the court whenever he feels he can make a sufficient showing of rehabilitation.

The pardon procedure, insofar as it affects the fundamental right to vote, is unconstitutionally vague. There are no standards by which the Governor is to act in determining whether to grant or deny a pardon. No time limit is imposed within which the Governor must act. While Governors have traditionally and properly exercised broad discretion in the granting of pardons, that discretion must be limited when a fundamental right is involved. *Cf., Cox v. Louisiana*, 379 U.S. 536 (1965); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965). A state law which required that prospective voters interpret, to the satisfaction of the registrar, provisions of the State constitution was

struck down by this Court precisely because it vested an unfettered discretion in the state to pick and choose among its residents those whom it would allow to vote. Mr. Justice Black, speaking for eight members of the Court stated:

> "The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar." *Louisiana v. United States*, 380 U.S. 145, 153 (1965).

Obviously, what the State cannot do through its registrars it cannot do through its Governor.

B. California's Failure to Afford Ex-Convicts a Hearing on Their Present Qualification to Vote Constitutes a Denial of Due Process of Law in Violation of the Fourteenth Amendment to the United States Constitution.

The California Constitution, as amended in 1972, provides that,

> "The Legislature shall prohibit improper practices that affect elections and shall provide that no severely mentally deficient person, insane person, person convicted of an infamous crime, nor person convicted of embezzlement or misappropriation of public money, shall exercise the privileges of an elector in this state." Petitioner's Brief at page 3.

As the California Supreme Court noted in *Otsuka v. Hite*, 64 Cal.2d 596, 51 Cal.Rptr. 284 (1966), if the standard to be used in denying the right to vote is conviction of an "infamous crime," then the disqualification of a voter must rest on the facts in his particular case, including the nature of the crime, the circum-

stances of its commission, the period of time which has elapsed since its commission, and the extent of the offender's subsequent rehabilitation. (64 Cal.2d 605, 611.)

The determination that a crime is an infamous one is made at the administrative level by the local registrar of voters. Since the law requires that the determination of an ex-convict's right to vote be made at an administrative level and that such determination involves questions of law and fact,[14] due process requires that ex-convicts be afforded a hearing at the administrative level. *Cf., Interstate Commerce Commission v. Louisville & Nashville R.R.*, 227 U.S. 88, 91 (1913):

> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing is denied."

It is now well settled that, when a governmental agency withdraws previously conferred benefits from an individual, it may do so only in accordance with due process standards. See generally, *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Dixon v. Alabama State Bd. of Education*, 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961); *Green v. McElroy*, 360 U.S. 474 (1959). The fundamental requirement of due process is the opportunity to be heard. *Willner v. Comm. on Character and Fitness*, 373 U.S. 96 (1963); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (concurring opinion) (1951); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). This opportunity to be heard must be afforded at a meaningful time and

[14]See, *Otsuka v. Hite*, 64 Cal.2d 596, 611, 51 Cal.Rptr. 284 (1966).

in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1967). The question of what constitutes a hearing at a meaningful time in a meaningful manner depends for answer on the nature of the governmental function involved. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). Cases requiring that administrative hearings be held before agency action becomes final are increasingly common. See, *e.g., Goldberg v. Kelly, supra; Escalera v. New York City Housing Authority*, 425 F.2d 653 (2d Cir. 1970); *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964); *Java v. California Dep't of Human Resources Dev.*, 317 F.Supp. 875 (N.D. Cal. 1970), *aff'd on other grounds*, 402 U.S. 121 (1971). Starting with *Londoner v. Denver*, 210 U.S. 373 (1908), a long line of cases hold that, when a governmental agency acts in an adjudicatory capacity, a trial type hearing must be held.

The eventual availability of judicial review is no substitute for prior administrative hearing.[18] *Southern Railway Co. v. Virginia*, 290 U.S. 190, 199 (1933). Such a prior hearing is the best protection against arbitrary action by the governmental agencies involved. *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292, 302 (1937); *Dixon v. Alabama State Bd. of Education, supra*, 294 F.2d at 157. It also gives the agency the opportunity to clear up any confusion as to the facts of the case and to discover and correct its own errors—thus, helping to alleviate the occasion for judicial review. *McGee v. United States*, 402 U.S.

[18]California Elections Code § 350 provides, "If the county clerk refuses to register any qualified elector in the county, the elector may proceed by action in the Superior Court to compel his registration. . . ."

479 (1971). Most importantly, such a hearing provides the reviewing court in an action under Section 350 of the Elections Code with the grounds for the agency's decision. In circumstances where an individual is deprived of a fundamental right without hearing, without the opportunity to know the evidence against him, and without the agency stating the reason for the denial, no contestant could have fair opportunity for review by the court. There would be nothing to show the grounds upon which the administrator acted. He alone would be cognizant of the mental processes which begot his opinion. *Southern Ry. Co. v. Virginia, supra,* 290 U.S. at 198.

Accordingly, petitioner's contention that the procedures for re-enfranchisement satisfy the equal protection and due process requirements, is not well taken.

Conclusion.

The case before this Court must be considered in light of society's whole experience, including the development of constitutional law doctrines and the evolvement of the science of conducting elections. The California Supreme Court considered these factors and found that the continued disfranchisement of ex-convicts was unconstitutional. This Court should affirm the judgment of that Court.

Respectfully submitted,

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